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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.F., a Person Coming Under the Juvenile Court Law.	H039549 (Santa Clara County Super. Ct. No. JD20955)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. K.P., Defendant and Appellant.	

K.P. is the mother of J.F.[1] She appeals from the juvenile court's order terminating her parental rights and selecting adoption as the permanent plan for her daughter. (Welf. & Inst. Code, § 366.26.)[2] She contends that the juvenile court erred in failing to apply the parental relationship exception to the termination of parental rights. We find no error and affirm.

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1 R.F., J.F.'s father, is not a party to this appeal.

2 All further statutory references are to the Welfare and Institutions Code.

I. Procedural and Factual Background

J.F., who was born in July 2009, was the subject of a section 300 petition filed by the Department of Family and Children's Services (Department) in November 2011. J.F. lived with appellant prior to being detained by the Department. The amended allegations of the section 300, subdivision (b) [failure to protect] petition stated: J.F. had been placed into protective custody after her parents were arrested for outstanding warrants and there were no available caregivers for her; J.F. was at significant risk of harm due to repeated exposure to domestic violence by her parents; R.F. physically and verbally assaulted appellant; both parents had a history of substance abuse; and R.F. had an extensive criminal history.

The initial hearing report stated that appellant had a history of methamphetamine use and that a prior referral for general neglect of her older daughter, N.F., in 2006 had been substantiated. At that time appellant had agreed to voluntary family maintenance services, but failed to participate in the services and the case was closed.[3] The report also stated that J.F.'s parents had been in a dating relationship since 2007 and cohabited for one year. However, they ended their relationship in August 2011. The report summarized incidents of domestic violence involving the parents. In the most recent incident, appellant went to R.F.'s residence to pick up J.F., and R.F. pushed her onto a garden table, which caused swelling and pain to appellant's arm. R.F. then brandished an axe-pick and a knife. Appellant called 911. Both parents were eventually arrested on outstanding warrants.

The detention rehearing report recommended that J.F. continue to be detained. This report noted that appellant had often been a victim of domestic violence and that she perpetrated violence on R.F. and her own mother. Extended family members and R.F. stated that appellant often left J.F. in their care for "various amounts of time."

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[3] N.F., who was born in 2007, is in the custody of her father M.F.

In a memorandum, which was dated December 28, 2011, the social worker reported on a visit between J.F. and appellant. J.F. was "extremely happy" to see appellant, who was "very appropriate and loving" towards her. The social worker observed that appellant and J.F. had a very "strong relationship." When appellant left, J.F. screamed for her, threw herself back and forth, and cried for five to seven minutes.

The jurisdictional/dispositional report, which was dated December 30, 2011, recommended that the petition be sustained, jurisdiction be established, and the parents receive family reunification services. The report documented the parents' previous involvement with the Department and their history of domestic violence. J.F. was healthy and had no developmental delays. On December 21, 2011, the Department placed J.F. with her maternal aunt. The aunt agreed to supervise visitation for appellant twice a week for two hours. The first visit "went very well."

The Department submitted an addendum report, which was dated January 13, 2012. The report noted that appellant continued to miss her drug testing appointments. The report also stated that family members had advised the social worker that they preferred that the visits be supervised by the Department, because appellant had been "physically aggressive" with them. On January 12, 2012, appellant did not attend a scheduled visit at the Department. In addition, appellant provided the social worker with inconsistent information regarding her whereabouts, her activities, and her difficulties with transportation. The social worker opined that appellant's "erratic behavior" indicated that she was "struggling with her sobriety."

In an addendum report, which was dated January 23, 2012, the social worker stated that appellant's supervised visit with J.F. on January 19, 2012 went very well. Appellant "talked to her with a loving calm voice, played with her, read to her, held her, and kissed her showing very appropriate affection." After J.F. became extremely upset when passing the lobby, the social worker and appellant agreed that she associated the

office with the threat of being removed from appellant. At the end of the visit, J.F. was happy to see her maternal aunt.

After an uncontested jurisdictional hearing on February 7, 2012, the juvenile court sustained the amended petition and ordered reunification services for appellant and R.F. The reunification services included parenting classes, counseling, random drug testing, a 12-step program, a drug assessment, and domestic violence services. The juvenile court also ordered twice weekly, supervised visitation for appellant. In addition, the juvenile court granted appellant's request for a three-year restraining order against R.F.

The Department submitted an interim report, which was dated March 20, 2012. The social worker stated that J.F. was doing well in her aunt's care. Appellant had completed a parent orientation class, but she missed the first parenting class. Appellant had not begun counseling services. On February 24, 2012, appellant told the social worker that she had relapsed and used methamphetamine, and thus she was not testing. Appellant also stated that she wanted to be admitted into a residential drug program. A few days later, appellant confirmed that she had been accepted into the program. However, the social worker could not verify appellant's status at the program. The social worker did not know appellant's whereabouts and could not reach her by phone.

The Department submitted an addendum report, which was dated April 10, 2012. Appellant stated that she had left the detox program after four days because she was required to pay for residential treatment. According to the drug treatment program, however, appellant left the detox program because she did not want to go to the residential program. Appellant also reported that she was "actively" using methamphetamine. Appellant told the social worker that she did not want to see J.F. in her current state and did not explain why she had not contacted the social worker. Appellant acknowledged that she had missed her visits with J.F. since January.

In the six-month review report, which was dated July 25, 2012, the Department recommended that family reunification services be terminated for both parents and the

case be set for a section 366.26 permanency planning hearing. The Department recommended that J.F. be adopted by her aunt. The social worker was unable to reach appellant until appellant contacted her on July 23, 2012. Appellant claimed that she had been "clean" for 60 days and agreed to meet with the social worker with documentation of her sobriety. She later called the social worker to reschedule the appointment for the following morning. Appellant did not appear for the rescheduled appointment and the social worker was unable to reach her as of the date of the report. Appellant had not visited J.F. since January 2012. Her compliance with other aspects of her reunification case plan had been minimal. She had submitted to drug testing only three times during the reunification period and her last test was on February 16, 2012. According to the social worker, appellant had demonstrated that she loved and cared about J.F., but she was unable to care for her. However, J.F. was thriving and doing well in her aunt's care. Her aunt was pleased with J.F.'s progress and wanted to ensure that J.F. had "a stable family life to grow and thrive."

An addendum report, which was dated August 27, 2012, stated that appellant missed her scheduled appointments with the social worker, but she left documents at the Department on July 30, 2012. These documents indicated that appellant had attended some 12-step meetings and had registered with a domestic violence support group. Appellant called to take a drug test the day before the last hearing and her test was negative. However, she called to drug test intermittently after that date. On August 7, 2012, appellant met with the social worker and reported that she had been clean for 60 days and wanted to work on getting J.F. back. Two weeks later, appellant met with the social worker again. When the social worker reminded her that she needed to call every day to drug test, appellant became upset, claimed that she did not know about this requirement, and ended the meeting early, stating that "adoption is not an option." Appellant also failed to attend scheduled appointments for a drug assessment.

The Department submitted an addendum report, which was dated September 25, 2012. Appellant had resumed weekly visits with J.F. on September 6, 2012. However, she missed the visit on September 17 to take her mother to the emergency room. J.F. looked forward to the visits, and both appellant and J.F. were affectionate towards each other and engaged in various activities together.

On December 26, 2012, the Department brought an ex parte application for an order for counseling services for J.F. "to help her with the transition with the supervised visit" with appellant. Appellant had refused to sign the consent forms for the counseling services. The juvenile court issued the order.

The section 366.26 report, which was dated January 16, 2012, recommended termination of parental rights and adoption by J.F.'s aunt as the permanent plan. J.F. was a healthy, developmentally on track three-and-one-half-year-old child. She was playful and communicative. The aunt had known J.F. since birth, and appellant and J.F. lived with her for about a year. The aunt wanted J.F. to know who her parents were and was willing to allow contact between them and J.F. if they were not using drugs and behaved appropriately. The aunt reported that J.F. calls her "mom," and J.F. is aware that she is her biological aunt. The aunt was committed to adopting J.F. J.F. was doing well in her aunt's home and had established a bond and relationship with her aunt and her family. J.F. viewed her aunt as "a parent figure that takes care of her. She is excited to see her and after daycare, she grabs her bag and tells her daycare provider 'mom is coming' and happy to see [her aunt] according to the daycare provider."

The report also described appellant's visits with J.F. Appellant visited J.F. twice a week for two hours after September 13, 2012. One visit each week was supervised at the Department while the other was supervised by Kindred Souls. However, appellant missed six visits between October 17, 2012 and January 10, 2013. Another visit was cancelled because both appellant and J.F. were sick. J.F. "looks forward and is excited to have visits with [appellant]. She yells out "mommy" when she sees her mother and they

both would hug and kiss each other at the start of the visit. . . . Both [appellant] and J.F. tell each other that they miss each other and love each other and proceed with the visit." During some visits, appellant cried and J.F. comforted her. When J.F. referred to her aunt as "mom," appellant told her to say, "tia." Appellant brought snacks and sometimes gifts of toys, money, and clothes. Appellant also "encourages [J.F.] to communicate to her, . . . sets limits with [J.F.], and when [J.F.] does not comply with [appellant's] requests or prompts to do something, [appellant] asked 'what's wrong' and continues to repeat the questions. The more [appellant] presses, [J.F.] is observed to get[] quiet and not respond[]." Appellant also attempted to explain the concept of patience to J.F. On another occasion, when J.F. did not respond to appellant's questions, appellant continued to question J.F., became frustrated, asked J.F. if she should pack up the toys, and started crying. According to staff supervising the visits, appellant "is less responsive to feedback during the visits and gets defensive about her right to engage the way she wants with her daughter."

At the section 366.26 hearing on January 29, 2013 appellant's counsel advised the court that appellant's ride had not shown up and she could not get to the hearing in time. The juvenile court granted a continuance.

The Department submitted an addendum report, which was dated February 18, 2013. This report provided additional information on appellant's visits with J.F. Appellant's last visit with J.F. was on January 16, 2013. Appellant did not call to confirm the visits on January 2 and 3, 2013. Appellant's cousin canceled appellant's visit at the Department on January 9, 2013 because appellant was in a car accident. Appellant confirmed the visit at the Department on January 16, 2013, but she failed to confirm the visit with Kindred Souls on January 17, 2013. The social worker emailed and called appellant to remind her that she needed to contact Kindred Souls regarding her visits so that she would not be removed from the visitation schedule due to two missed visits. Appellant was later removed from the visitation schedule at Kindred Souls. On

January 23, 2013, appellant contacted the social worker and told her that she wanted someone else to supervise her visits at the Department due to another social worker's treatment of her. This social worker had encouraged appellant to change how she questioned J.F. because it caused J.F. to become anxious. Appellant also reported that she missed the January 3, 2013 visit at Kindred Souls because J.F. was in Colorado. When the social worker reminded appellant that J.F.'s travel plan was at the end of February 2013, she became upset and hung up.

Appellant did not appear at the continued hearing on February 19, 2013. After her counsel requested a continuance, the juvenile court set the matter for a contested hearing.

On March 13, 2013, the juvenile court conducted the section 366.26 hearing. Instead of testifying, appellant submitted an offer of proof. If called, she would have testified: she had consistently visited her daughter except when she was receiving treatment for a medical issue or did not have transportation; her visits with J.F. had been positive and loving; J.F. was always happy to see her and cried when the visits were over; J.F. asked her when she would be able to see her again; and she believed that terminating her parental rights would hurt her bond with J.F. and thus hurt J.F.

Following the hearing, the juvenile court issued a written decision. The juvenile court found by clear and convincing evidence that J.F. was adoptable and adoption was in her best interest. The juvenile court also found that appellant failed to establish by a preponderance of the evidence that the parental relationship exception applied. The juvenile court stated that appellant "maintained a somewhat regular visitation schedule with the child, and that the child knows [appellant] as her natural mother. However, the child views her maternal aunt as a 'parent figure that takes care of her.'. . . Further, the Court finds that the child's need at age three for security, stability and a sense of belonging in an adoptive family outweighs the strength and quality of her relationship with [appellant] and the tenuousness of a less permanent plan." Thus, the juvenile court terminated parental rights and freed J.F. for adoption.

Appellant filed a timely notice of appeal.

II. Analysis

Appellant contends that the juvenile court erred by failing to apply the parental relationship exception to the termination of parental rights.

The California Supreme Court has stated that "[t]he objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

"Adoption must be selected as the permanent plan for an adoptable child and parental rights terminated unless the court finds 'a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.'" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*).) This is known as the parental relationship exception.

The proponent of the parental relationship exception bears the burden of producing evidence of the existence of a beneficial parental relationship. Because the existence of such a relationship is a factual issue, the court's finding on this point is reviewed for substantial evidence. (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.) "[A] challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.' [Citation.] Unless the undisputed facts established the existence of a beneficial parental or sibling relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed." (*Ibid.*)

"'The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life

spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs.' [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' [Citation.] Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*Bailey J., supra,* 189 Cal.App.4th at pp. 1315-1316.)

Even if the juvenile court finds a beneficial parental relationship, the parental relationship exception does not apply unless the court also finds that the existence of that relationship constitutes a "compelling reason for determining that termination would be detrimental . . . ." (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B).) A juvenile court's ruling on whether there is a "compelling reason" is reviewed for abuse of discretion as the court must "determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and . . . weigh that against the benefit to the child of adoption." (*Bailey J., supra,* 189 Cal.App.4th at p. 1315.) Under the abuse of discretion standard, "'"'a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. . . .'" . . . "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason."'" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*).)

Here, appellant visited J.F. from December 15, 2011 to January 19, 2012. She then stopped visiting J.F. for almost eight months. Though she visited J.F. between September 9, 2012 and January 16, 2013, she missed six visits during this period.

Appellant did not visit J.F. between January 16, 2013 and March 13, 2013 when the section 366.26 hearing was held. Thus, the evidence supports the juvenile court's finding that appellant maintained a "somewhat regular visitation schedule."

As to the second prong, the record did not establish that the relationship between appellant and J.F. was a beneficial relationship. J.F. was three years and nine months old when the section 366.26 hearing was held. She had spent slightly more than half of her life in appellant's custody. Yet while she was in appellant's custody, appellant often left J.F. with other family members and R.F. Though appellant and J.F. had a "very strong relationship" when J.F. was first removed from appellant's custody, and appellant was able to calm J.F.'s fears, the nature of their relationship changed. After appellant stopped visiting J.F. for almost eight months, it was J.F. who comforted appellant and told her not to cry. Appellant and J.F. continued to express affection towards each other during the reunification period, but appellant became less aware of J.F.'s developmental needs and engaged in behavior that created anxiety for J.F. Moreover, appellant was unable to accept suggestions from the social worker on ways to improve her interactions with J.F. As a very young child, J.F. needed stability and security, and now viewed her aunt as the "parent figure that [took] care of her." Thus, the evidence established that appellant did not have a beneficial parental relationship with J.F.

Even if appellant had established the existence of a beneficial parental relationship, she cannot show that the juvenile court abused its discretion in finding that the relationship did not constitute a "compelling reason" for finding that termination of parental rights and the selection of adoption as the permanent plan would be detrimental to J.F. Here, the juvenile court found that J.F.'s need at age three for security and stability outweighed the strength and quality of her relationship with appellant and a less permanent plan.

Appellant argues that the parental relationship exception can apply to a child of J.F.'s age. Appellant also focuses on the following: J.F.'s expressions of love for her a

year after she was removed from appellant's custody; one of the supervised visitation reports in which both appellant and J.F. scored four out of five on their interactions during the visit; and the description of the positive, but not the negative, aspects of the visits between September 2012 and January 2013. However, given the evidence that J.F. was adoptable and was currently living in a stable home with her aunt who wanted to adopt her, balanced against evidence of appellant's inconsistent presence in J.F.'s life due to her history of substance abuse, the juvenile court's ruling did not "exceed[] the bounds of reason." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

Appellant's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) does not persuade us otherwise. In *S.B.*, the father was the child's primary caretaker for three years; he maintained consistent and appropriate visitation with his daughter; and after she was removed from his care, he immediately acknowledged that he could not continue using drugs, began services, maintained sobriety and complied with all the requirements of his case plan. (*S.B.*, at p. 298.) Though the juvenile court found that the father had frequent and loving visits with his child and "an emotionally significant relationship" with her, it also found that he did not have a parental relationship with her or that it would be greatly detrimental to the child to terminate his parental rights. (*Ibid.*) The reviewing court held that there was no evidence to support the juvenile court's finding that the parent did not have some type of parental relationship with the child. (*Ibid.*) The reviewing court also found that the juvenile court had erred in basing its decision to terminate parental rights in part on the relatives' willingness to allow the parent to visit the child. (*Id.* at p. 300.) Based on this record, the reviewing court reversed the order terminating parental rights. (*Id.* at pp. 300-301.) First, *S.B.* applied the substantial evidence standard rather than the abuse of discretion standard in determining whether the parental relationship exception applied. (*Id.* at pp. 297-298.) Second, in contrast to *S.B.*, here, appellant failed to visit J.F. for approximately eight months during the reunification period, continued to use drugs, and did not comply with most of the requirements of her

case plan. Third, unlike in *S.B.*, here, the juvenile court did not base its determination on the aunt's willingness to allow appellant to visit J.F.[4]

III. Disposition

The order terminating parental rights and selecting adoption as the permanent plan is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Grover, J.

[4] *In re C.B.* (2010) 190 Cal.App.4th 102 is distinguishable from the present case on the same ground. In *C.B.*, this court held that the juvenile court had erred in making its determination as to the applicability of the parental relationship exception by considering the prospective adoptive parents' willingness to allow the children to have contact with their mother after the adoption. (*Id.* at p. 127.)